

**BEFORE THE
Communications C
WASHINGTON, DC 20554**

In the Matter of)
)
Connect America Fund) WC Docket No. 10-90
)

To: Chief, Wireline Competition Bureau

**COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, hereby submits Comments in response to the December 27, 2012 *Public Notice* regarding Connect America Fund (“CAF”) Phase II procedures.¹ WISPA agrees with certain of the Bureau’s proposals and urges adoption of WISPA’s recommendations, which will better ensure the fairness and transparency of any process adopted that would challenge the accuracy of the National Broadband Map (“NBM”). By implementing WISPA’s proposals, the Commission and the Bureau can better determine those areas that are already subject to “unsubsidized competition” and thus ineligible for Phase II support.

¹ Public Notice, *Wireline Competition Bureau Seeks Comment on Procedures Relating to Areas Eligible for Funding and Election to Make a Statewide Commitment in Phase II of the Connect America Fund*, DA 12-2075 (rel. Dec. 27, 2012) (“Public Notice”). Following publication in the Federal Register, the Wireline Competition Bureau (“Bureau”) released a Public Notice stating that the deadline for filing initial Comments would be February 19, 2013. See Public Notice, *Comment Cycle Established for Bureau’s Public Notice Regarding Connect America Phase II*, DA 13-80 (rel. Jan. 22, 2013). Accordingly, WISPA’s Comments are timely filed.

Introduction

As the Commission and the Bureau are well aware, WISPA has actively participated in the proceedings related to CAF Phase I, CAF Phase II and the Remote Areas Fund. Although WISPA has presented its views on many issues, a primary focus has been on ensuring that the Commission and the Bureau – through rules, policies and practices – do not provide financial support to areas where wireless Internet service providers (“WISPs”) and others already provide qualifying broadband service. To this end, WISPA has vigorously objected to waiver requests filed by price cap carriers that declined Phase I funding² and to procedures for challenging the NBM for Phase I in cases where the evidence does not meet a high standard of proof.³

The *Public Notice* affords WISPA an opportunity to offer its proposals on how to best construct a process to challenge the accuracy of the NBM for CAF Phase II. Unlike for Phase I, for Phase II the Commission has expressly authorized the Bureau to provide parties with the opportunity to “challenge the determination of whether or not areas are unserved by an unsubsidized competitor” after the Bureau publishes a list of the census blocks depicted as unserved on the NBM.⁴ WISPA generally supports the Bureau’s proposals insofar as they recognize the need to ensure that the challenge process does not devolve into an unfair process that favors Phase II recipients. WISPA presents a number of recommendations that will improve upon that process.

² See WISPA Opposition to CenturyLink Petition for Waiver, WC Docket No. 10-90, *et al.* (July 12, 2012); WISPA Opposition to Windstream Election and Petition for Waiver, WC Docket No. 10-90, *et al.* (Aug. 24, 2012); WISPA Opposition to FairPoint Communications, Inc. Petition for Waiver of Sections 54.312(b)(2) and (3) of the Commission’s Rules and Conditional Election of Incremental CAF Support, WC Docket No. 10-90, *et al.* (Oct. 11, 2012); WISPA Opposition to Petition for Waiver of Alaska Communications Systems, *et al.*, WC Docket No. 10-90, *et al.* (Oct. 12, 2012).

³ Comments of WISPA, WC Docket No. 10-90, *et al.* (Jan. 28, 2013) (“WISPA Phase I Comments”).

⁴ *Connect America Fund*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 1766, 17729 (2011).

Discussion

I. The Challenge Process Should Take Place After Proposed Recipients Have Identified the Locations Where They Will Accept Phase II Subsidies.

The challenge process envisioned by the Commission would take place after the cost model for Phase II is developed.⁵ WISPA urges the Bureau to implement the process after carriers elect or decline the public interest obligations for their respective territories. As WISPA and ITTA proposed with respect to Phase I, the “challenge process should occur once price cap carriers have identified the particular areas where they would like to use CAF Phase I incremental support. This would minimize the burden on all parties – including the Bureau – by limiting challenges to the specific locations that matter.”⁶ The same logic applies here. The time, effort and resources that existing providers, potential recipients and the Bureau would need to expend in filing, reviewing and verifying challenges can be greatly reduced if the process does not begin until after carriers have made their Phase II elections. This would be consistent with the *USF/ICC Transformation Order*, because the challenge would still occur after the cost model is developed.

II. The Bureau Should Retain its Broadband Speed Threshold to Identify an “Unsubsidized Competitor.”

WISPA agrees with the Bureau that it should retain the 3/768 “advertised speed” component of its definition of “unsubsidized competitor.”⁷ As the Bureau notes, this approach

⁵ See *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et al.* (rel. Nov. 18, 2011) (“*USF/ICC Transformation Order*”), at ¶ 171; *Public Notice* ¶ 8.

⁶ See Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 10-90 (Jan. 9, 2013) at 3; WISPA Phase I Comments at 8.

⁷ *Id.* ¶ 9. WISPA’s position here should not be construed to alter the proposed change in the definition of “unsubsidized competitor” contained in its pending petition for reconsideration. See WISPA Petition for Partial Reconsideration, WC Docket No. 10-90, *et al.* (Dec. 29, 2011).

would maintain consistency with rules adopted for CAF Phase I. The Bureau should not change the rules mid-stream to countermand the expectation that existing broadband providers have had over the last 15 months. As WISPA stated in opposing a change in speed requirements for CAF Phase I:

WISPA objects to the Commission's proposal because it attempts to change the rules of CAF Phase I *after* fixed broadband providers have reasonably relied on existing rules as assurance that the Commission will not fund competitors in the unsubsidized areas where they already provide service. The Commission should not now be setting a new and higher broadband speed standard with the only aim being to offer further government subsidies exclusively to price cap carriers. Changing the rules to enable price cap carriers to directly compete against existing, self-funded broadband providers is contrary to the Commission's stated intent of avoiding subsidizing areas where broadband is already available.⁸

The same rationale applies for Phase II. The 3/768 speed threshold for unsubsidized competitors should be retained.

III. The Commission Should Rely on the Most Current Version of the NBM.

The Bureau proposes to use the June 2012 version of the NBM to initially determine the census blocks that are unserved.⁹ If this is the most current version of the NBM at the time the challenge process takes place, then WISPA favors its use. If, however, a more current version of the NBM is available, the Bureau should use that version. WISPA also agrees that the most current version of the NBM should be the default resource to resolve differences in determining whether a census block is already served.¹⁰

WISPA also concurs with the Bureau's proposal "to treat partially served census blocks as served and therefore not eligible for funding in Phase II."¹¹ The Bureau notes its legitimate concern that the "administrative burden of permitting challenges at the sub-census block level

⁸ WISPA Phase I Comments at 5.

⁹ See *Public Notice* ¶ 10.

¹⁰ *Id.* ¶¶ 18 & 19.

¹¹ *Id.* ¶ 21.

would outweigh the potential benefits.”¹² WISPA agrees that the effort it would take to reduce Bureau review to a level below the census block would be counterproductive.

IV. The Commission Should Only Deem as “Served” a Census Block Depicted as “Unserved” if the Evidence is “Clear and Convincing.”

The Bureau provides many examples of what evidence could be used to challenge the eligibility of a particular area for Phase II funding.¹³ WISPA generally agrees that these examples would be “probative evidence regarding the availability of broadband service meeting the speed requirements”¹⁴ and supports the requirement that all certifications be signed by an individual with relevant knowledge.¹⁵ However, missing from the Bureau’s proposals is any suggestion of the standard of proof that the Bureau would use to overturn the depiction of an area on the NBM. As it proposed in the WISPA Phase I Comments, WISPA urges the Commission to make changes to “unserved areas” on the NBM only where the evidence is “clear and convincing.”¹⁶ This high standard should be uniformly implemented and applied for both Phase I and Phase II to ensure that accurate information on the NBM is not erroneously corrected. The varied level of evidence and detail contained in responses to the Bureau’s earlier request for mapping corrections for Phase I¹⁷ demonstrates the need to adopt a standard that exceeds the “more probable than not” standard the Bureau proposed for Phase I. A “clear and convincing proof” standard would be appropriate.

¹² *Id.*

¹³ *See id.* ¶¶ 11-12.

¹⁴ *Id.* ¶ 12.

¹⁵ *Id.* ¶ 15.

¹⁶ WISPA Phase I Comments at 8.

¹⁷ *See* Public Notice, *Wireline Competition Bureau Seeks Comment on Areas Shown as Unserved on the National Broadband Map for Connect America Phase I Incremental Support*, DA 12-1961 (rel. Dec. 5, 2012); Public Notice, *Wireline Competition Bureau Updates the List of Potentially Unserved Census Blocks in Price Cap Areas and Extends the Deadline for Comment on the List*, DA 12-2001 (rel. Dec. 10, 2012) (collectively, “*Unserved List Public Notice*”).

V. The Challenge Process Should Promote Fairness and Transparency.

The Bureau asks whether challengers to the NBM should be required to serve copies of their challenges on the party that would be affected by a potential change in the status of a census block.¹⁸ WISPA urges the Bureau to adopt a service requirement to ensure that targets are afforded actual notice of challenge and have a reasonable opportunity to respond with appropriate evidentiary information. In the *Unserved List Public Notice*, parties were encouraged to serve copies on targeted providers, but it appears that few actually did so.¹⁹ Given that the stakes are the subsidization of areas that are already served, prospective recipients in particular should be required to serve copies of their challenges. In addition, challenges should be filed in the docket via ECFS. WISPA further agrees that parties should have 45 days to file initial challenges, but believes that 30 days (instead of the proposed 20 day response time) would afford parties a more reasonable period of time to file accurate and responsive information.²⁰

¹⁸ See *id.* ¶ 16.

¹⁹ *Unserved List Public Notice* at 1.

²⁰ *Public Notice* ¶ 17.

Conclusion

WISPA agrees with many of the proposals described in the *Public Notice*, but urges the Bureau to implement procedures that will avoid unnecessary expenditure of resources, ensure a high standard of proof before making any changes to the areas depicted on the NBM and promote fairness and transparency.

Respectfully submitted,

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WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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